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NO. 80-1348

IN THE

Supreme Court of the United States

October Term 1980

STATE OF FLORIDA,
DEPARTMENT OF STATE,

Petitioner,

v.

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF OF THE STATES OF ALABAMA, ALASKA, CALIFORNIA BY ITS STATE LANDS COMMISSION AND ITS STATE HISTORIC PRESERVATION OFFICE, HAWAII, ILLINOIS, LOUISIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, NORTH CAROLINA, SOUTH CAROLINA AND TEXAS, THE VIRGIN ISLANDS, AMERICAN SAMOA AND THE GOVERNMENT OF GUAM

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In Support of the Petitioner, Amici Curiae

INTEREST OF AMICI CURIAE

The *amici* are all states or territories with significant interest in the continued ability of the states to protect and conserve their historic resources, particularly those underwater archaeological artifacts which can form such a special and invaluable link with our past. The opinion below, *State of Florida, Department of State v. Treasure Salvors,* 621 F.2d 1340 (1980), [hereinafter cited as *Treasure Salvors II]* has placed in jeopardy the role of the states in the preservation of our archaeological

heritage. As this Court has noted, speaking through Mr. Justice Brennan in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 108 (1979), quoting Robert Stipe:

> '[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing - or perhaps developing for the first time - the quality of life for people'.[1]

While the substantive aspects of this case are of grave interest to these *amici*, perhaps even more important to the individual states is the direct attack which has been made on the principle of sovereign immunity from suit embodied in the Eleventh Amendment of the United States Constitution. It is this aspect of the case that has led these *amici* to participate in this matter. These *amici* are in full support of the position of the petitioner State of Florida, as set out in its brief, but feel that the special role the Eleventh Amendment protection has served in the formulation and development of this country requires that it be given additional consideration.

The vitality of the Eleventh Amendment has perhaps been lessened in recent years, primarily due to the increased instances in which the sovereign has consented to suit (or waived its immunity); but the instant case presents no instance of established consent, or waiver, by the State of Florida, and involves instead the very basic, purely local, question of contract obligations between a state and one of its own citizens. It is believed that the Court of Appeals for the Fifth

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[1]Gilbert, Introduction, Precedents for the Future, 36 LAW & CONTEMP. PROB. 311, 312 (1971), quoting address by Robert Stripe, 1971 Conference on Preservation Law, Washington, D.C., May 1, 1971 (unpublished text, pp. 6-7).

Circuit has glossed over the fundamental jurisdictional question of suability in order to reach certain implied admiralty questions, which it obviously felt only could be addressed by the federal courts.

This case presents clearly the opportunity for the reaffirmation of the Eleventh Amendment immunity in situations in which consent, or waiver, is not present.

SUMMARY OF ARGUMENT

It is the position of the *amici* that the decision of the Court of Appeals for the Fifth Circuit has placed in jeopardy the fundamental protection the Eleventh Amendment provides to the states. The facts of this case, when boiled down to their basics, reveal nothing more than the intrusion of the federal court into a purely local contractual matter. This is particularly disturbing since the subject matter of the contracts at issue involve an important governmental function - that of locating and protecting our underwater historic and archaeological resources.

The courts below have refused to heed the Eleventh Amendment bar to their jurisdiction in order to reach certain implied admiralty questions. The ruling of the Court of Appeals, that the action is not one against the state, made in connection with determining its jurisdiction, concerns these *amici* states because it leads directly to the principle that an allegation of some illegal action on the part of an officer of the sovereign insures that a claimant may sue the state in federal court. This notion has been rejected numerous times and, in the absence of any allegations of unconstitutional action by the sovereign, the suit should have been dismissed. The state has been called into the federal court, without its consent, in order to retain possession of materials and artifacts obtained through a contractual agreement with one of its own citizens. Such a result is obviously

incompatible with the continued viability of the Eleventh Amendment.

ARGUMENT

I.

THE DECISION BELOW SUBJECTS THE STATE OF FLORIDA TO THE JURISDICTION OF THE FEDERAL COURT IN A PURELY LOCAL CONTRACTUAL MATTER CONCERNING THE PRESERVATION OF ITS HISTORIC AND ARCHAEOLOGICAL RESOURCES, WHICH IS A PROPER GOVERNMENTAL FUNCTION.

This matter has followed a very long and involved procedural path since the discovery of the Spanish ship, *Nuestra Senora De Atocha*, in 1971 by the respondents herein. The history of the search is well documented in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330 (1978) [hereinafter cited as *Treasure Salvors I*] and in a National Geographic article, Lyon, *The Trouble With Treasure*, 149 National Geographic 787 (June 1976). While the resiliency of the respondents may be perceived by some to add an element of daring and adventure to this case, at issue is not the discovery of the *Atocha*, however exciting; but rather this case concerns the ability to contest in federal court the title to certain goods and artifacts presented to the State of Florida by the respondents, citizens of the State of Florida, pursuant to a series of contracts executed by the parties between 1971 and 1975. Each contract was for a period of approximately one (1) year. Under the contract, Armada Research was to conduct underwater salvage from and upon certain submerged sovereignty lands of, and belonging to, the State of Florida; and the State, *inter alia*, was to provide certain recordation, authentication and evaluation services. Pursuant to the contracts, the

State of Florida received the artifacts and materials which were the subject of the District Court's Warrant for Arrest In Rem. These artifacts and materials were in the lawful possession of the State before Treasure Salvors filed *Treasure Salvors, Inc. v. Abandoned Sailing Vessel,* 408 F. Supp. 907 (S.D. Fla. 1976) in the United States District Court for the Southern District of FLorida.

The State entered the contracts in furtherance of the very great public interest in the location and preservation of the historic artifacts. Perceived in this light, the case strikes at the very heart of the Eleventh Amendment protection previously afforded to the states and calls into question the ability of the states to legislate, and contract, within the area of archaeological preservation, particularly with regard to underwater historic resources. It cannot be disputed that archaeological preservation is indeed important to the states. In 1965, Florida became the first state to specifically include underwater archaeological resources in its antiquities legislation, following the discovery of substantial amounts of treasure in its territorial waters.[2] Florida's Department of State, Bureau of Historic Sites and Properties is charged with the responsibility to:

> Locate, acquire, protect, preserve and promote the location, acquisition and preservation of historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial

[2]FLA. STAT. §§267.01-267.08 (1965), 1965 Florida Laws ch. 66-300, §§1-8, later replaced by FLA. STAT. §§267.011-267.14 (1979), 1967 Fla. Laws ch. 67-50, §§1-11.

> sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof. FLA. STAT. §267.061(a)(a).

Since that time, eleven other states have expressly included sunken shipwrecks within the protection of their antiquities legislation.[3]

Preserving cultural and historical resources has become a national policy in the United States.[4] Indeed, the United States Supreme Court has long recognized

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[3]GA. CODE §40.813(a)(1978); IND. CODE §14-3-3-3-1(m) (Cum. Supp. 1980); LA. REV. STAT. ANN. tit. 41 §§1601 and 1605 (1974); MASS. GEN. LAWS ANN. ch. 6 §§179-180 (1977); MISS. CODE ANN. §39-7-9 (1972); N.C. GEN. STAT. §§121-22-121-28 (1981); R.I. GEN. LAWS §§42-45.1-3--42-45.1-4 (1977); S.C. CODE §§54-7-210--54-7-280 (Cum. Supp. 1980); TEX. CIV. CODE ANN. tit. 9 §§191.001--191.174 (Supp. 1979); VT. STAT. ANN. tit. 22 §§701, 781-782 (1978); VA. CODE §10-145.9 (Cum. Supp. 1980).

Other states, while not referring to sunken or abandoned ships, include submerged or underwater sites in their protection of archaeological resources. See ALASKA STAT.§§41.35.020 (1977); COLO. REV. STAT. §24-80-401 (1973); HAWAII REV. STAT. §§6E-2 and 6E-7 (1976); ME. REV. STAT. ANN. tit. 27 §§371 and 373 (1969); MINN. STAT. §§138.31 and 138.37 (1980); OR. REV. STAT. §§273.705(a), 273.722, 273.728, 274.005(7), 274.025 (1979); WASH. REV. CODE §27.53.040 (1979); WIS. STAT. §§27.012(1)--27.012(9) (1975).

[4]Note, *Cultural Resources Preservation and Underwater Archaeology: Some Notes on the Current Legal Framework and a Model Underwater Antiquities Statute*, 15 SAN DIEGO L. REV. 623, 654-660 (1978). *See also* National Historic Preservation Act of 1966, 16 *U.S.C.* §470 (1970), which declares: "The Spirit and direction of the nation is founded upon and reflected in its historic past;...the historical and cultural foundations of the nation should be preserved...in order to give a sense of orientation to the American people; [and] it is...necessary and appropriate for the Federal government to accelerate its historic preservation programs and activities, (and) to give maximum encouragement to agencies and individuals undertaking preservation (as well as) State and local governments."

that protection and preservation of historic landmarks is a proper governmental objective for the exercise of the power of eminent domain. *United States v. Gettysberg Electric R. Co.*, 160 U.S. 668 (1896); *Roe v. Kansas ex rel. Smith*, 278 U.S. 297 (1929). Most recently, the Supreme Court re-articulated this premise in a case involving a city's use of the police power in order to effectuate landmark preservation, stating that "New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 129 (1978).

These *amici* submit that under the auspices of Chapter 267 of the Florida statutes, a marine *res* with historical and cultural significance should not be granted any less protection than a historic building or landmark. While recognition of the value and importance in securing our underwater cultural heritage has perhaps been slow in coming, it certainly can be ignored no longer.

> Once on the seabed, or even covered by beach sands, countless wrecks are reasonably well preserved - protected against man, the most destructive agent of all. Sculpture, pottery, weights, tools, glass and weapons are found in wrecks in large numbers in a better state of preservation and usually more precisely dated than on land sites. As early as the first half of the nineteenth century, geologist Charles Lyell could write that "it is probable that a greater number of monuments of the skill and industry of man will in the course of ages be collected together in the bed of the ocean, than will exist at any one time on the surface of the Continents." (citation omitted). Bass, *Marine*

Archaeology: A Misunderstood Science, OCEAN YEARBOOK 2 (1980).

It is unquestioned that a state's police power has been used to preserve and regulate the use of valuable resources necessary for the public welfare. *Skiriotes v. Florida*, 313 U.S. 69 (1941). The Court has also permitted states to regulate traditionally maritime activities so long as these regulations were related to essential state police power interests. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-43 (1960); *Kelly v. Washington*, 302 U.S. 1, 9-10 (1937). The states have properly recognized that the heritage of this country can be, and in many cases has been, lost without a proper emphasis being placed on locating, acquiring and preserving our historic underwater archaeological sites and properties. The State of Florida, Division of Archives, administers one such program pursuant to the authority contained in the FLA. STAT. §267.011-267.014. The program allows historical information to be obtained, generally through a cooperative effort between the state and private salvage companies, and to be catalogued, preserved and displayed for all generations to enjoy.

This interest of the states is not at odds with federal maritime law, nor should it be considered an intrusion therein. The states have broad interests in many areas which may at times coincide with certain federal interests, and it is clear there need not be found any irreconcilable conflict. The most recent case to address this possible conflict is *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1972). There the Court found state regulation in the area of oil spill prevention to be permissible absent a clear conflict with federal law, and stated:

> To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage - an insiduous form of poliution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent. *Id.* at 328-329.

The coastal states' interest in the preservation of their underwater archaeological resources is similarly great.[5] In addition, it naturally follows, in the wake of the United States' failure to convince the Fifth Circuit of its jurisdiction over the *Atocha* in *Treasure Salvors I*, that the State of Florida's dealings with Treasure Salvors was a necessary and proper governmental function.[6]

This governmental function perhaps needs to be placed in proper perspective, in light of the tenor of the opinions below. While the states do not have the pecuniary interest in the gain associated with "treasure-hunting", neither do they seek to stifle the competitive free-enterprise urges of the salvors. The interest of the states is in the preservation of these irreplaceable cultural resources, and in the knowledge of our ancestry to be gained from their location and protection. Refusal to acknowledge the states' very great interest in these archaeological resources will likely mean the loss of any meaningful opportunity to learn of our past from them. This possibility is not one which has failed to stir archaeologists from time to time.

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[5]The authority of states to legislate and contract in areas concerning shipwrecks has previously been addressed in *Ervin v. Massachusetts Co.*, Fla., 95 So.2d 902(1957); *Bruton v. Flying "W" Enterprises*, 273 N.C. 399, 160 S.E. 2d 482 (1968); and *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 508 F.2d 1113 (1975).

[6]See Lawrence, *State Antiquity Laws and Admiralty Salvage: Protecting Our Cultural Resources*, 32 MIAMI L.REV. 291 (1977).

> Treasure hunters very rarely are willing to spend the vast amounts of time and money necessary for proper conservation procedures in order to preserve artefacts recovered from the sea. This would be counterproductive to their goal which is the quick sale of the artefacts in order to gain a monetary profit.
>
> Another danger to the site posed by the treasure hunter is the destruction of the physical interrelationship of the artifacts from which archaeologists and historians can derive interpretations of otherwise unrecorded facts relating to the structure and function of the ship, cargo, passengers, and crew. This information is worth more than the monetary value of the artefacts themselves. Once again the recording of provenience, like conservation, is not something the treasure hunter bothers with since it would slow down and increase the cost of his operation. Arnold, *Some Thoughts on Salvage Law and Historic Preservation,* The International Journal of Nautical Archaeology and Underwater Exploration, 7.3:173-176 (1978).

It is submitted that to allow jurisdiction, in spite of the Eleventh Amendment immunity, to challenge in Federal court the local contractual arrangements made in furtherance of this proper and important governmental concern undermines the fundamental tenets of the amendment.

II.

THE ELEVENTH AMENDMENT EXTENDS TO SUITS IN ADMIRALTY; IN ANY EVENT, ADMIRALTY IN REM NOTIONS SHOULD NOT BE ALLOWED TO OBSCURE THE FACT

THAT AN ATTACK HAS BEEN MADE ON THE STATE'S ABILITY TO RETAIN THESE MATERIALS AND ARTIFACTS OBTAINED PURSUANT TO CONTRACT.

The Eleventh Amendment states that:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. CONST. amend. XI.

While the language of the amendment does not expressly concern the ability of a citizen to sue his own state, it has been so construed and may now be considered axiomatic. The early case of *Hans v. Louisiana*, 134 U.S. 1 (1889) stands for the proposition that a suit by a citizen of a state against the state, without its consent, is prohibited by the Eleventh Amendment. Recently, the principle was reiterated in *Edelman v. Jordan*, 415 U.S. 651, 662 (1973), *reh. den.* 416 U.S. 1000 where the court stated:

> While the amendment by its terms does not bar suits against a state by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in federal court by her own citizens as well as by citizens of another State.

In addition, while the language of the amendment speaks merely to suits in law and equity, it has been found to be specifically applicable to suits in admiralty. The case of *Ex Parte Madrazzo*, 32 U.S. (7 Pet.) 627 (1883), initially addressed this issue. There the State of Georgia was libelled by one Juan Madrazzo, a subject of the King of Spain. The case is interesting, not merely for its holding, but also for the similarity between its

underlying factual situation and that of the instant case. The libel in *Madrazzo* claimed that the state illegally possessed certain proceeds from the sale of slaves from the vessel *Isabelita*, and the court was requested to award admiralty process against the state to show cause why the proceeds should not be paid over to the libelant. The Court stated definitively that:

> The case is not a case where the property is in custody of a court of admiralty, or brought within its jurisdiction, and in the possession of any private person. It is not, therefore, one for the exercise of that jurisdiction. It is a mere personal suit against a state to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a state. Id. at 632.

This principle was reaffirmed in companion cases, *In Re State of New York, No. 1*, 256 U.S. 490 (1921) and *In Re State of New York, No. 2*, 256 U.S. 503 (1921), the latter being known as the *Queen City* case. The first suit involved libels against tugs for damages occurring while the libelants' boats were being navigated by the tugs on the Erie Canal. The tugs were claimed to have been under charter to the superintendent of public works for the State of New York, and motions were served upon him to appear and answer. The Attorney General appeared specially and filed a suggestion that the court was without jurisdiction, as the suit was against the State of New York. The court found that the District Court indeed had no jurisdiction, stating:

> We repeat, the immunity of a state from suit in personam in the admiralty brought by a private person without its consent, is clear. *In Re State of New York, No. 1*, 256 U.S. at 500.

The court further stated that it was not inconsistent to afford states their sovereign immunity in admiralty courts, since this immunity in other tribunals was well established. The *Queen City* case next applied the immunity to an in rem admiralty action involving a libel against the tug, *Queen City*, which was the property of the State of New York. The general principle, then, that the immunity privilege applies in an in rem admiralty action was established.

> The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process in rem applies with even greater force to exempt public property of a state used and employed for public and governmental purposes. *In Re State of New York No. 2*, 256 U.S. at 511.

This principle is important as an initial proposition, due to the blurring in the courts below of the essential contract issue with issues of admiralty. The Court of Appeals apparently felt its exclusive admiralty in rem jurisdiction must be invoked in order to provide some forum for Treasure Salvors.[7] If, however, the action is in actuality found to be based on in rem admiralty principles, it is clear that the immunity of the State can operate to bar the action.

It is submitted by these *amici* that the continued reference to this matter as an in rem admiralty-type action is misplaced, and has obscured the real focus with which this jurisdictional question should be viewed. The action, at least since the issuance of the

[7]See, e.g. *Treasure Salvors II*, 621 F.2d at 1346, n. 19, where the court stated "[I]f the mere assertion of ownership by a state of a res was sufficient to invoke the Eleventh Amendment, petitioners such as Treasure Salvors would find themselves stranded without a forum in which to litigate their claims."

Warrant for Arrest In Rem, has never been a true in rem - against all the world - cause. The Court of Appeals, in *Treasure Salvors I*, 569 F.2d at 335, stated:

> The United States intervened in plaintiffs' in rem action as a party defendant and filed a counterclaim asserting a property right in the *res*. The government, by intervening in this action and by stipulating to the court's admiralty jurisdiction waived the usual requirement that the *res* be present within the territorial jurisdiction of the court and consented to the court's jurisdiction to determine its interest in the extra-territorial portion of the vessel.

Thus, the jurisdiction in the initial cause was established only by the consent occasioned by the entry into the action by the United States. The interest of the State of Florida was never addressed, and certainly was not foreclosed, by this action. The Court of Appeals expressly noted:

> ...[W]e do not approve that portion of its [the District Court] order which may be construed as holding that plaintiffs have exclusive title to, and the right to immediate possession of, the vessel and cargo as to other claimants, if any there be, who are not parties or privies to this litigation. *Treasure Salvors I*, 569 U.S. at 336.

The true nature of the proceedings is an in personam-type action, directed against the State of Florida. The concern with the vessel *Atocha* need not be considered directly. *Madruga v. Superior Court*, 346 U.S. 556 (1954), concerned a petition by a minority owner of a vessel to prohibit the Superior Court in and for the County of San Diego from entertaining a complaint for partition and sale of the vessel by the majority owners. The Court

looked at the real interests of the parties, and found the cause not to be in rem in the admiralty sense. While there were perhaps some questions of admiralty implied, the court held the quarrel was basically between the co-owners, and that "[e]asily accessible local courts are well equipped to handle these essentially local disputes." *Id.* at 563.[8]

While the matter may be so intimately intertwined with admiralty notions that the Court may choose not to make distinctions with regard to the exact nature of the suit - in rem or in personam- the principles argued in support of the State's immunity are equally applicable regardless of that characterization. The interest of the *amici* in reiterating the limitations on the jurisdictional holding of *Treasure Salvors I*, and in raising the in personam/in rem distinction is to caution against finding some justification for the issuance of the Warrant for Arrest and Show Cause Order in vague in rem admiralty principles.

This cautionary note is particularly appropriate in that the materials and artifacts at issue were not present within the territorial confines of the federal court for the Southern District of Florida, but were housed in Tallahassee, Florida, in the Northern District prior to, and during, this litigation. "To establish *in rem* jurisdiction in admiralty the *res* must be present in the district when the suit is filed or during the pendency of the action." *Platoro Ltd. Inc. v. Unidentified Remains of A Vessel*, 508 F.2d 1113, 1115 (1975).

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[8]See also *Ex parte Madrazzo*, 32 U.S. (7 Pet.) 627, 632 (1833) in which the Court considered the suit to recover proceeds in the possession of the State as a "mere personal suit against a State...."

III.

THE QUEEN CITY CASES SUPPORT A FINDING OF THE ELEVENTH AMENDMENT BAR TO THIS ACTION; THE "SPECIAL CHALLENGE" LANGUAGE THEREIN DOES NOT ALLOW THE FEDERAL COURT TO DETERMINE THE VALIDITY OF THE CONTRACTS UNDER WHICH THE STATE CLAIMS.

Much has been argued below in an effort to distinguish the clear holding of *Queen City;* in particular much time has been devoted to construction of the following language found therein:

> We deem it clear, however, that the verified suggestion presented by the Attorney General of that State, in his official capacity as representative of the State and the People thereof, amounts to an official certificate concerning a public matter presumably within his official knowledge, and that it ought to be accepted as sufficient evidence of the fact [of ownership], at least in the absence of a special challenge. *In Re State of New York, No. 2,* 256 U.S. at 509.

The lower court construed this language as a limitation of the *Queen City* ruling, such that the Eleventh Amendment would not bar the action when the claim of state ownership was *controverted* by the opposing party.

> The *Queen City* tells us that when a state submits uncontroverted evidence of ownership in an admiralty in rem action, the district court is bound to accept the assertion and apply the Eleventh Amendment accordingly. In the case at bar, however, we have a *controverted* claim of ownership.

> Treasure Salvors offered evidence and legal argument to show that it, and not Florida, owned the artifacts from the *Atocha*. Such an offer is the "special challenge" that the Supreme Court envisioned in the *Queen City*. *Treasure Salvors II*, 621 F.2d at 1345.

These *amici* submit that this is a clearly unwarranted construction of the "special challenge" language, and that is needlessly and recklessly opens the door to the virtually unassailable "jurisdiction to determine jurisdiction" arguments upon which the hopes of the respondents' are pinned. See *United States v. United Mine Workers of America*, 330 U.S. 258, (1947) and *Nestor v. Hershey*, 425 F.2d 504 (1969). However, such arguments are wholly outside the true issues in this cause, and if followed would lead inescapably to the result envisioned by Judge Rubin in his dissent below:

> In essence the suggestion by my brethren that the court can determine whether it has jurisdiction of a suit over state-claimed property by looking to the merits is equivalent to asserting that suits against a state are permitted by the Eleventh Amendment if the result is that the state loses.*Treasure Salvors II*, 621 F.2d at 1351.

A careful reading of the factual context in which the "special challenge" language of *Queen City* appeared reveals that the court was not thereby setting up an adjudication of that claim, as occurred below, but was merely determining whether the State was the real party in interest. The record of proceedings itself did *not*, in *Queen City*, reveal anything about the ownership of the vessel or its employment by the State other than the suggestion of the Attorney General. The issue arose upon the verified suggestion, and the Court merely

concluded that, inasmuch as there had been no "special challenge" to the suggestion, it should have been accepted.

> It would be an unwarranted aspersion upon the honor of a great state to treat facts thus solemnly certified by its chief law officer, and accepted as true when passed upon by the District Court, as now requiring verification. *In Re State of New York No. 2*, 256 U.S. at 509.

It is thus submitted that the Court was speaking in terms of what might be an accepted practice and procedure, and not definitively carving out an Eleventh Amendment exception for *controverted* state ownership.[9]

Further, the court below, even following its *controverted* claim line of reasoning, went far beyond what was necessary to determine the threshhold Eleventh Amendment issue. The question raised at every turn by the State of Florida's Motion to Quash Warrant for Arrest In Rem, its Reply to Rule to Show Cause, and its Petition for Prohibition and for Stay is not the *validity* of the contracts under which it received the property in question, but rather the *existence* of its title pursuant to the contracts prior to any lawsuits pertaining to ownership of the vessel. The underlying dispute over the construction of the contracts is purely and simply a local question, quite separate from any admiralty considerations. Assuming *arguendo* that the "special challenge" language has the connotation placed upon it by the Court of Appeals, can it be

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[9]This notion is further supported by the care taken by *Queen City* to distinguish *In Re Muir*, 254 U.S. 522 (1921), which had involved a suggestion of British ownership of the vessel *Gleneden* which "...came not through official channels, but from private counsel...." *In Re State of New York No. 2*, 256 U.S. at 510.

seriously contended that this enables the Court to reach the very merits of the issue — the *validity* of the contracts? These *amici* believe such a construction would seriously undermine the basic premise of the Eleventh Amendment. "A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent." *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 51 (1944). While the existence of various consent, and waiver, theories may be considered by some to have eroded the vitality of the Eleventh Amendment's immunity,[10] these principles do not constitute such a direct assault as this case on the state's freedom from interference of the federal judiciary in matters of such purely local concern as contracts with its own citizens.

IV.

THE SUIT IS ONE AGAINST THE STATE, AND THE "JURISDICTION TO DETERMINE JURISDICTION" ARGUMENT ADVANCED BY THE RESPONDENTS DOES NOT ALLOW THE COURT TO REACH THE MERITS OF THE CASE ONCE THIS IS ESTABLISHED.

The *amici* contend the Court of Appeals' ruling, that this does not present a suit against the state, given in such a cavalier, almost "off-hand" manner, also portends an erosion of the Eleventh Amendment immunity which is simply not warranted. It is clear that the real party in interest here is the State of Florida. There has been, throughout the proceedings below, no

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[10]See Thornton, *The Eleventh Amendment: An Engandered Species*, 55 IND. L.J. 293 (1977).

indication that the suit could be couched as anything other than one against the State.

Almost from the very beginnings of the construction of the Eleventh Amendment, various escapes from its prohibition to suit have been considered. One such route has been to name individual officers of the state and prosecute the action against them. The court has examined these devices in detail and has indicated that:

> The general rule is that a suit is against the sovereign if 'the judgment sought would be to restrain the government from acting, or to compel it to act.' (citations omitted) *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

These *amici* support, in particular, the argument of the State of Florida, that this is indeed a suit against the sovereign. Not only has it involved throughout as the party of record, the State of Florida, the Department of State and its Division of Archives, it is clear that the contract and property rights of the State, and not any individual, are at issue. The line of cases, beginning with *Pennoyer v. McConnaughy*, 140 U.S. 1 (1890) and expanded upon, and crystallized, by *Ex Parte Young*, 209 U.S. 123 (1908), generally to the effect that immunity is unavailable to officers of the state seeking to enforce an unconstitutional act, are inapposite since there is no suggestion of improper action taken pursuant to some unconstitutional authority. It is not to be argued that, if such were the case, the court would be powerless to entertain the action.

> The other class [of Eleventh Amendment action] is where a suit is brought against defendants who, claiming to act as officers of the State and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the

> plaintiff .... Such suit ... is not ... an action against the State. (all citations omitted) *Pennoyer v. McConnaughy,* 140 U.S. at 10.

It is submitted that the principles expressed in the watershed case, *Larson v. Domestic and Foreign Corp.,* 337 U.S. 683 (1949) are controllng, and that the "jurisdiction to determine jurisdiction" argument advanced below should be repelled. In *Larson,* the War Assets Administrator had been sued to enjoin the sale of surplus coal which allegedly had been previously sold to the plaintiff. The Court carefully, and purposely, avoided the underlying contract-construction issue, and found the district court had no jurisdiction over the unconsenting sovereign. The case is instructive in that there were no claims of unconstitutional actions by the officer involved, but merely a "cause of action" claim of an illegal possession of the coal. Similarly, the Division of Archives in the instant case has been claimed by the respondents to be in illegal and improper possession of the *Atocha* artifacts, even though its interest therein has been at all times pursuant to legislative authority and validly-executed contracts. *Larson* disposes of the argument that the allegation of "illegal" action is enough to overcome the Eleventh Amendment by stating:

> ...the actions of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are unconstitutionally void. *Id.* at 701-702.

The Court of Appeals should not have looked to the underlying contract in order to bootstrap the matter

into its jurisdiction. The obvious result of such a maneuver was correctly pointed out by Judge Rubin, and these *amici* urge that this approach be nullified. As in the *Larson* line of cases[11], the ultimate question on the merits may be assumed for purposes of decision to go against the sovereign, but in the absence of some claim of unconstitutional action, the suit must be dismissed as one against the sovereign without its consent.

The real effect of this suit is not to adjudicate statutory authority or even the alleged unconstitutional actions of an officer of the state, but to compel the state to appear in federal court in order to retain possession of its own property, obtained through a contractual arrangement with one of its own citizens. It is simply a question-begging device to declare or imply that such would not be a suit directed against the sovereign.

V.

THE STATE OF FLORIDA HAS NOT WAIVED ITS IMMUNITY; IN PARTICULAR, ITS INTEREST IN HISTORIC PRESERVATION AND UNDERWATER ARCHAEOLOGICAL ARTIFACTS IS NOT A *PARDEN*-LIKE ENTRY INTO FEDERAL MARITIME ACTIVITY.

While the Court of Appeals' decision ignored aspects of the consent/waiver doctrines which are so important to Eleventh Amendment considerations, the District Court raised several interesting points with regard to the state's consent to the suit which should be addressed.

The Eleventh Amendment privilege of immunity can scarcely be mentioned without noting that it involves notions that the sovereign state cannot be sued without

[11]See also *Goldberg v. Daniels*, 231 U.S. 218 (1913) and *Malone v. Bowdoin*, 369 U.S. 643 (1962).

its consent, and that the privilege may be waived. *See Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858). One such method of waiver is by voluntary appearance in an action to present a claim.

In *Gardner v. State of New Jersey*, 329 U.S. 565, 67 S. Ct. 467 (1947), cited by the District Court, *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507 (S.D. Fla. 1978), the Court noted that the state had waived its immunity with respect to certain claims involving a debtor railroad by becoming the actor and filing a claim in bankruptcy. The fallacy of applying this principle in the case *sub judice* is readily apparent, as the State of Florida has never voluntarily become an "actor" seeking to establish rights in the property at issue. It has rather been subjected to the federal court-issued warrant for arrest for property in its possession pursuant to contract.

Neither can it be said that the state has waived its Eleventh Amendment privilege by its appearance in this suit, even to answer a claim on the merits. In *Ford Motor Company v. Dept. of Treasury*, 323 U.S. 459 (1945), the Court addressed the situation in which the Attorney Geneal appeared, represented the State, and defended the action on its merits. The Eleventh Amendment claim was not even raised until the action reached the Supreme Court, but the Court nevertheless undertook to determine whether any executive or administrative officer of the State had been authorized to waive the state's immunity. The Court stated that such authorization "...is not to be presumed in the absence of clear language to the contrary...", *Id.* at 468, and found no waiver. Similarly here, no waiver authority has been found, and the appearance by the State below has not operated to overcome the Eleventh Amendment privilege.

A state may also waive its immunity, and consent to suit by legislative or constitutional pronouncements. However, the waiver must not only be express and unequivocal, it will not generally be found to authorize suits against the state in courts other than its own. See *Murray v. Wilson Distilling Company*, 213 U.S. 151, 171 (1909); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944); *Ford Motor Company v. Dept. of Treasury*, 323 U.S. 459 (1945). These *amici* expressly support the position of the State of Florida to the effect that neither the Florida Constitution, FLA. CONST., Art, 10, §13, nor its statutes, can be construed to be an express and unequivocal waiver of immunity in this type of action.

The most recent applications of the waiver doctrine have involved the entrance of the state into areas of federally-regulated activities. The triumvirate of cases, beginning with *Parden v. Terminal R. of Alabama State Docks Department*, 377 U.S. 184 (1964), *reh. den.* 377 U.S. 1010, as further refined by *Employees of Dept. of Public Health & Welfare v. Dept. of Public Health & Welfare*, 411 U.S. 279 (1973) and by *Edelman v. Jordan*, 415 U.S. 651 (1973), have resulted in the unavailability of the privilege when (1) as a threshhold matter, Congress has expressly indicated that suits against the state are possible under an applicable federal law, and (2) the state voluntarily participates in the activity governed by the law. These principles are not involved in this matter, except in the most peripheral sense. It is apparent that this case does not present the opportunity for application, or extension, of the waiver doctrine as amplified by *Parden*, *Employees* and *Edelman*, but the cases are instructive to remind one of the scope and breadth of the Eleventh Amendment, and to reiterate the underlying principle that waiver is not lightly to be inferred, as was done so by the courts below. As the

Court stated in *Edelman*, citing *Murray v. Wilson Distilling Company*, 213 U.S. 151 (1909):

> In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as would leave no room for any other reasonable construction.' *Edelman v. Jordan*, 415 U.S. at 673.

The district court's argument, in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. at 529, that a *Parden*-like waiver is present due to the engagement of the State of Florida in a "salvage operation" constitutes a convoluted interpretation of the waiver doctrine, and should not be further advanced. The interest of the state in the area of preservation of its historic artifacts need not be considered as an entry into some vague field of federal maritime activity. (See Argument I, *supra.*) Although the Court of Appeals failed to address consent or waiver in its decision, it is apparent that concluding the State of Florida has made a *Parden*-like entry into a federally regulated area is erroneous and that such a theory cannot operate to confer jurisdiction on the Court.[12]

There simply is no consent, or waiver, to be found in the actions of the State of Florida in this matter. Absent such a consent, the suit against the state must be dismissed. To allow the respondents to call the state into

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[12] In *Intracoastal Transportation, Inc. v. Decatur County Georgia*, 482 F.2d 361 (1973), a case in which entry into a federally regulated sphere of activity was presented explicitly, and in which admiralty jurisdiction was at issue, the Fifth Circuit did not find any implied consent. Of similar import is *Williamson Towing Co., Inc. v. State of Illinois*, 534 F.2d 758 (1976).

federal court and have the legality of its possession of these historical artifacts adjudged is simply and clearly not in accordance with the traditional protection afforded by the Eleventh Amendment. Stripped of its implied in rem admiralty notions, the matter may be viewed as a very direct intrusion on the basic principle of immunity from suit in federal court.

CONCLUSION

For the reasons stated above, *amici* urge this Court to find that the Eleventh Amendment bars this action against the State of Florida, and to reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted this the 31st day of July, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of August, 1981, three (3) copies of BRIEF FOR THE STATES OF ALABAMA, ... IN SUPPORT OF THE PETITIONER, AMICI CURIAE, were mailed, by depositing same in the United States Post Office, with first class postage prepaid, to counsel of record at the following addresses:

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